**NATIONAL LABOR RELATIONS BOARD**

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| **SUPPLY TECHNOLOGIES, LLC** | ) | Case No.: 18-CA-19587 |
| | ) | |
| Respondent, | ) | |
| | ) | |
| vs. | ) | |
| | ) | |
| **TEAMSTERS LOCAL 120** | ) | |
| | ) | |
| | ) | |
| Charging Party. | ) | |
| | ) | |

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**RESPONDENT, SUPPLY TECHNOLOGIES, LLC's**
**REPLY IN SUPPORT OF MOTION TO REOPEN THE RECORD**
**AND IN RESPONSE TO ACTING GENERAL COUNSEL'S OPPOSITION**

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## I. INTRODUCTION AND MOTION

Pursuant to Sections 102.46(h)[1] and 102.48(b), (d)[2] of the Rules and Regulations ("Rules") of the National Labor Relations Board (the "NLRB"), Respondent Supply Technologies, LLC (the "Company") respectfully requests leave to submit a Reply in support of its Motion to Reopen the Record and in response to the Opposition submitted by Counsel for the Acting General Counsel ("AGC"). The Company seeks leave to respond directly to AGC's assertion that the new evidence that the Company wishes to submit is irrelevant to whether the Company's Total Solution Management Program ("TSM") interferes with employee's rights under Section 7 of the National Labor Relations Act (the "Act").

[1] Rules Action 102.46(h) provides that permits a party to file a reply to an answering brief that responds to exceptions or cross-exceptions to an ALJ's Recommended Determination. The Rule also permits further briefs to be filed with leave of the Board. To ensure compliance with the Rules, this Reply complies with the substantive provisions set forth in Rules Section 102.48(h), in that it is limited to matters raised in AGC's Opposition Brief.

[2] Rules Section 102.48(b) provides that "upon the timely filing of exceptions . . . the Board may . . . reopen the record and receive further evidence before a Member of the Board or other Board Agent or agency . . ." The Company filed Exceptions ("Exceptions") and Brief in Support ("Brief") in the above-captioned case on July 12, 2011 which are incorporated herein by reference. Additionally, to ensure compliance with the Rules, this Motion complies with the substantive provisions set forth in Rules Section 102.48(d).

## II. DISCUSSION

In its Motion to Reopen the Record, the Company submitted highly probative evidence challenging AGC's assertion, and the ALJ's conclusion, that a reasonable employee would believe that they surrendered rights under Section 7 of the Act as a result of the TSM Program. The Company submitted evidence – the accuracy of which the AGC implicitly accepts – that employees operating under the virtually identical prior arbitration program of the Company ("DRA program") – which the AGC begrudgingly concedes has "substantive similarities" with TSM – asserted rights under that program, filed charges with a federal administrative agency, and either settled their claims or pursued their rights to arbitrate the dispute.

When confronted during the hearing with evidence of the DRA and the employees' assertion of rights under that program, the ALJ responded by questioning its relevance and ultimately ignoring its impact. He erroneously questioned DRA's legal enforceability and held that former employees no longer are bound by it.

Now confronted with even stronger evidence that DRA remains quite viable and that former employees asserted rights under the program and successfully settled claims via mediation or litigated claims via arbitration, AGC wants the ALJ and/or the Board to commit the same error. AGC declares unilaterally that the probative and damaging evidence of actual employee conduct is "irrelevant" under the reasonable employee analysis.

AGC apparently contends that the actions and thoughts of actual employees are completely irrelevant to the actions and thoughts of some "reasonable" employees – a group that seems to live only in the fictitious mind of the AGC, where no one is given credit for understanding anything and where only AGC and the Board can protect them. According to AGC, what reasonable employees do and think is not based upon factual evidence, but upon what is dictated exclusively by what is in the mind of AGC, the ALJ and the Board. What could

be better evidence of what a reasonable employee would do than what three actual employees did?

To suggest that what employees' actually did is irrelevant is ludicrous. Here, we have the unusual situation where the reasonable employee standard can be assessed by what actual living and breathing employees actually did. Try as they might, one cannot shut out the real world in determining how reasonable employees act and think. AGC cannot escape the inexorable fact that real employees repeatedly engaging in a particular course of conduct undermines the argument that reasonable employees would do and think the opposite.

Accordingly, the Company reiterates it request to reopen the record to allow additional evidence of participation by some of the discriminatees in the identical DRA program.

Respectfully submitted,

**ZASHIN & RICH CO., L.P.A.**

***/s/Stephen S. Zashin***

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## CERTIFICATE OF SERVICE

I hereby certify that on July 25, 2012 the foregoing was filed electronically via the E-Filing system on the NLRB website. The foregoing was also served via certified U.S. Mail and email on Catherine Homolka, Counsel for the Acting General Counsel, National Labor Relations Board, Suite 790, 330 South Second Avenue, Minneapolis, Minnesota 55401, (catherine.homolka@nlrb.gov) and T. Rhys Ledger, Director of Organizing and Government Affairs, Teamsters Local 120, 9422 Ulysses Street N.E., Blaine, Minnesota 55434 (rledger@teamsterslocal120.org).

***/s/ Stephen S. Zashin***
**Stephen S. Zashin**

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